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## **"ADVOCACY" A CHAPTER FROM ALBERT S. OSBORN'S "THE PROBLEM OF PROOF."**

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There is no other relation in human affairs exactly analogous to that of attorney and client. It is a relation that in its intimacy and responsibility is an example of supreme trust and confidence. By it we ask another for the time and the occasion to be ourselves. It is as if for the time being we transfer our individuality to another who then becomes our mind, our voice, and even in a degree, our conscience. It is not strange that this relation from the earliest times has been most closely guarded, and that there are inseparably connected with it certain rules of honor, which, to disregard, puts the brand of infamy upon the transgressor. To violate this sacred trust and be disloyal to a client is deservedly the unpardonable sin of an attorney. By this betrayal he sinks lower than by any other act of dishonor.

In the early history of advocacy this relation of advocate and client was not one of ordinary humdrum affairs. It was a noble service of honor and, if need be, of self-sacrifice of the strong for the weak, of the able for those who could not protect themselves. It was a kind of service for which, for many generations in human history, one who represented another would scorn the offer of any pay for the service rendered. Even to this day the barrister in England cannot collect by process of law a bill for services as a barrister. The debt is still a debt of honor.

In the course of time and as a result of the complications of civilization, the attorney's acts became, not occasional altruistic efforts, but a kind of service which merited a return that at first, however, was somewhat disguised under the term of honorarium. In the course of time a profession was developed which in modern times retains some of the ancient qualities, but which has taken on characteristics quite in contrast with some of those that existed during its early history.

Certain rules and practices were gradually developed and certain precedents established that were necessary to stability. It was found that a trial at law must necessarily be conducted in accordance with certain rules, and it became the business of the lawyer to see to it that the interests he represented were not endangered by the violation of these rules. At any time he could object to what he considered improper, and as time went by, certain rules of procedure were developed. Rules of some kind were, of course, absolutely necessary, but one of the weaknesses of the administration of the law from the beginning has been that the rules have tended to take on an almost unchangeable, if not sacred, character, and too many times have themselves defeated the very ends they were designed to promote.

Objections, exclusions, and exceptions are no doubt necessary, and at any rate are inevitable, in a trial at law, but the proper control of this phase of law practice is one of its greatest problems. One unfamiliar with the practice of law is astounded to learn that certain things cannot be done in court that common sense would suggest ought to be permitted. Obstructive tactics within the law may be wisely employed, but often are used in a manner that only tends to delay and to defeat justice. These tactics often at once arouse the suspicion of a jurymen, or indeed of anyone not familiar with law practice. There are many thoughtful men in the legal profession who are even coming to think that many of the revered rules of evidence should be radically changed, if not abolished altogether.

There is a type of advocate who, in his use of these various rules, is properly described as the negative or obstructing advocate. His business is not the proving of anything, but the prevention of proof. He succeeds if he prevents the facts from becoming known. While thus engaged he tries to make it appear that he is defending the eternal principles of justice and the very foundations of civilization and incidentally, of course, his client. His fighting methods are many times similar to those of the cuttlefish which, by discoloring or muddying the water and thus preventing anything from being seen, defends itself. Some of the ancient rules are often of great assistance to these men.

An advocate of this kind usually will be against the facts, a defender of a guilty man, or a representative of a fraudulent

claim. He accepts employment to win the case for his client. This end he will attain fairly, if possible, but if he cannot win fairly then he will employ other means. His methods are tinged, if not saturated, with insincerity and unfairness, and his final resource is perjury. He objects strenuously to everything that tends to injure his chance of success; and viciously attacks all opposing witnesses. And all the time, he who protects fraud and crime and cheats justice, poses as the zealous guardian of the ancient and revered rules and precedents.

Certain of these common abuses of advocacy can hardly be condemned with too great severity. They are flagrant, cruel, and shocking to the moral sense of all whose sensibilities have not become dulled by familiarity with them. They should not be excused and condoned, but should be repudiated by the great respectable majority of an honorable profession.

In connection with some of these abuses, openly practiced, a moral tone is exhibited which would be looked upon with scorn in any other field of human activity. Boasts are made of winning cases against the facts! It is thought to be commendably clever to destroy the effect of honest adverse testimony and thus defeat the ends of justice. Crime is thus encouraged and fraud made profitable. This conduct, at least tacitly, is often praised in discussion of the practice of law. This would be paralleled if a business man should be praised for his skill in cheating his neighbor across the way. As civilization advances this law practice, which openly defeats justice, will come to be looked upon with the scorn that it deserves.

Certain books on advocacy will also become obsolete, or will be revised so they are not in effect manuals teaching how to defeat justice. Their chapters on methods and tactics will be not simply directions as to the most effective ways of destroying the opponent's case and the testimony of honest witnesses. One would not gather from certain parts of certain books of this class that the purpose of courts of law is to establish justice. Think of a discussion of the practice of medicine with only a secondary or remote thought of the life of the patient!

There are lawyers who at once get purple with rage at any criticism of the law or of legal procedure of this character, es-

pecially if criticism is made by one who is not a lawyer. These men apparently look upon the law as something finished by certain more or less wise men many years ago for their use as a business. They resent criticism as a kind of interference with what they consider to be their own private affairs. To them the law is not a profession but a trade. The lawyers of the type described in Jarndyce and Jarndyce found no fault with the administration of the law of their day because it served their purposes, but there were those who saw its faults and corrected them. There still are Jarndyce cases, but their numbers are growing less through the efforts of judges, lawyers, and legal authors who, like the creator of the Jarndyce case, see the faults and gradually correct them.

There can hardly be a more responsible and important duty than that of the attorney called upon to plead the cause and protect the rights, or even the life, of another. As in the old days he still is the brain and the voice of his client. He becomes a defender and an advocate of the rights of him for whom he speaks. As his ability in furthering the interests of his client is the measure of his success as a lawyer, the business of advocacy in all its bearings must naturally be a subject of great interest to him. So important is it and so great is his interest that he is constantly tempted to overdo it. The undue emphasis of advocacy is one of its common weaknesses.

One of the most important things that the lawyer must do in order to be successful is to lead others to his own point of view, and his unwise overemphasis of the spirit of advocacy may become the enemy of persuasion. The sagacious trial lawyer seeks to protect his client's interests, but in doing so does not make of himself a prejudiced, unfair partisan. Many lawyers defeat the ends for which they strive by unwittingly trying too hard to protect a client's interest. If they appear for the defense, their excessive zeal and obvious bias gives the impression that by every means, fair or unfair, they will endeavor to prevent the guilt of their client from becoming known.

These advocates will not grant in any case, civil or criminal, that the opposition has even a shadow of a leg to stand upon. In court they object on the slightest provocation, and as a result of

these constant objections and their partisan attitude, the effect of everything they say is lessened. Their violent contentions, with equal effect, might as well be whispered in the words of some dead language instead of being spoken in the loud, rasping, disagreeable tone too often heard in court rooms. These men appear to be very active and busy attorneys, but because of their unwise zeal they give the impression that they are on the wrong side of the case. By their activity and intensity they lead a jury to think that they really would do quite well if they could only get on the right side of some good case.

The attorney whose too frequent objections are constantly being overruled also gives the impression to the untrained jurymen that he does not know what the law is and therefore is constantly being ruled against by the court. The too zealous advocate, by his whole conduct, finally arouses a permanent suspicion as to the sincerity of everything he says and does. The force of his incidental arguments and his final argument is greatly diminished, if not wholly nullified, because his manner and methods throughout the trial have been unfair and insincere. This advocate who is habitually insincere often possesses no more personal magnetism than a phonograph and is utterly devoid of ordinary human sympathy. He is a mere legal machine. This habitual mental attitude not only dulls the keen edge of conscience, but benumbs the higher judgment and makes impossible the highest efficiency.

By his unwise activity, his venom, his unfairness, and his vociferous defense of his client's interests, the advocate may win the applause of the shallow and unthinking, but at too high a price. By these tactics he is at the same time laying the foundation for defeat and, what is more unfortunate, for a reputation as one of that class of undesirable citizens in certain communities known as shysters. These men, often more dangerous and undesirable in a community than burglars and highwaymen, debase and disgrace an honorable profession. They can still be found at many county seats, but the vigorous activity of bar association vigilance committees is gradually lessening their activities in many communities.

The uncontrolled spirit of advocacy also has a tendency to

deaden, if not to destroy, that delicate, elusive, but most important of qualifications which we call tact, which has tremendous force in achieving success. It is a misfortune for a young lawyer to train himself in insincerity by advocating causes in which he does not believe. There are those who wisely advise that even in friendly debate it is not a good practice to take either side of any question. Mental agility is thus acquired at the expense of sincerity. This sort of training is good for the mind, but bad for the soul.

Undue emphasis on the spirit of advocacy also leads an entirely conscientious attorney to overload his case with evidence, to overtry it in every way, and to over-emphasize everything that he presents or discusses. The important and the trivial are with him both apt to be put into the superlative degree, and his whole conduct is governed by a partisan intensity which prevents him from applying ordinary sane judgment to many things. Many trial attorneys of this class apparently sit on springs in court and jump into the air at every provocation, with objections to everything unfavorable to their own contention and intense arguments on every point until all are weary and nobody is convinced. The most trivial point is argued with the same intensity that is given to the vital issue in the case, and as a result nothing is emphasized because everything is emphasized.

There is also another important ethical phase of this question of advocacy that deserves consideration. The unforgivable sin in an attorney is the betrayal of a client's interests. This relation of attorney and client is of so confidential and intimate character that custom and law have properly thrown around it the utmost protection. The relation is, however, sometimes interpreted and acted upon in a way that leads directly away from the interests of justice as well as of morals. Loyalty to a client is a plea which, too often it is assumed, will cover almost any sin from deception up to bribery.

The spirit of advocacy in too many instances develops a peculiar code of ethics which permits an advocate to do for a client what he would not, without some hesitation at least, do for himself. This strange code permits him, in the interest of his client, to misrepresent, deceive, lie, and suborn perjury. All of these

acts in any other relation than that of attorney and client he would condemn. Stranger still, he even may think it improper for the client to do things for himself that he, his lawyer, does not hesitate to do for him as his representative. This illustrates a strange sort of moral blindness which grows out of excessive and unwise advocacy. There are men who, perhaps because of familiarity with it, defend conduct of this kind who ought not to defend it.

The advocate is in duty bound to protect the interests of his client in every proper way, but for a fee he is not called upon to sell his own soul. Temptations are sure to come to the attorney that test the quality of his conscience and the strength of his character. There are unworthy clients who for money seek to buy not simply the experience and ability of an advocate, but also his reputation and his honor. The man who is disloyal to his own higher self in order to be loyal to a client is not only paying too high a price for success, but is disqualifying himself for the highest success. Those who resist the temptations deserve praise and honor in proportion to the severity of the test.

Most litigation grows out of controversy over certain alleged facts. In many cases the lawyer cannot know and may never know what the truth of the matter really is. It is also true that in some classes of cases each side may be partly right and partly wrong, but a careful distinction is drawn by the conscientious advocate between civil and criminal cases. Although the guilty man is entitled to counsel in order that his rights may be protected, it does not follow that a self-respecting lawyer should become in effect a partner of a party in a civil case who obviously is attempting to perpetrate a fraud. Just at this point comes the great temptation in the practice of law. No sophistry ever really convinces the lawyer that he has a right to smother his intelligence and say that he is not called upon to decide upon the merits of any case in advance. If he does not decide some cases in advance he will soon come to be known as a partner in fraud and in crime.

Like other professional men, lawyers are surrounded by certain conditions that hamper and limit their development. One of the greatest of differences in workers in all fields is the degree of

their inspiration by the student spirit, that attitude of mind that makes practical life a constant course of study. The education of men of this latter class is only finished when life is finished. But with many professional men the deadly routine and the making of the profession a business and only a business, tends to kill the learning spirit. They become mere machines going through a fixed routine.

There is a very wide distinction between the men who in some measure live for a profession and the men who simply live on it. Of professional men as a class but few attend conventions, but few read technical magazines or books, and it is a rare man who does the first stroke of work in any field of original research! There are many professional men, not all of whom are lawyers, who pay less for general technical books and magazines, and for memberships in societies, and traveling expenses to meetings, than they do for tobacco. The total number of members in the American Bar Association is about the same as the number of lawyers in one American city.

Experience with the unprogressive man develops simply a kind of manual and mental facility in the humdrum things and nearly all improvement stops. And strange to say, the man of this class, who has entirely finished his study, boasts that he is a practical man and looks with some contempt upon the progressive man who attacks the ancient theories with some new and improved ideas. There was a time when the learned doctor at once took some of the life out of a sick man by bleeding him. There was a time when solemn, bewigged doctors of the law condemned poor women to be hanged as witches. There still are abuses to correct and reforms to promote; and, figuratively speaking, the bleeding and the hanging are still going on.

The desirable, if not necessary, qualities that go to make a great lawyer are so numerous that it is discouraging to a beginner to catalogue them. There is, however, some value in a catalogue for one who is perhaps deficient in one quality can make it up by emphasizing others that are a part of the desirable equipment. It is easy to specify some of the essential qualities.

Before making this catalogue of the desirable qualities, and for the purposes of contrast, a passing glimpse is taken of the other

side of the shield. It is well known that there are men, even in quite civilized communities, whose ideal of a great lawyer is a forceful, rather coarse, if not somewhat brutal, personality, unhampered by fine sensibilities or a too active conscience, and willing to take up any task without too close a scrutiny of its merits. It is hardly necessary to say that this conception of the profession as a whole is a base slander. The men who answer these requirements unfortunately do exist, but they are not the great lawyers, but rather the scavengers of a great profession.

The first requirements of the great lawyer are a good working conscience and a strong personality. Added to these in the great advocate is what, for a better description, we call a ready, working knowledge of human nature. Other important, if not essential, qualities are the ability to understand facts, an analytical, alert mind, and a forceful command of language.

The great lawyer is a student of his fellow man. At no time in a trial does the skillful attorney forget the variations in the personalities with which he must deal. He understands the danger of weakening his case simply by a careless manner of dealing with those who must participate in the proceeding. He knows that people cannot with safety all be treated alike. He constantly realizes he cannot retrace a false step, nor recall an unwise word that has given offense. By experience he knows how easily a friendly witness may be antagonized, or the court may be offended, or adverse witnesses made more dangerous by oversight, by carelessness; by bad manners, or by any unfortunate error of speech or of conduct.

Either by instinct or by experience he has learned that even a disagreeable voice may contribute to defeat, and to him it is obvious that any conduct that naturally leads to aversion or dislike lowers efficiency in one who seeks to lead others to his own point of view. The wise attorney has learned in the school of experience that we are always more easily persuaded by one with an attractive personality, and that a man's logic may fail to convince because we do not like his manners. This wise and discriminating lawyer does not make the mistake of treating an adverse party too severely, even where severity is justified, and he has learned from the unwise actions of others as well as by bitter de-

feat that the testimony of adverse witnesses is often strengthened because the sympathy of jury and spectators has been aroused in their behalf.

The partly unconscious effect of personality is an important part of law practice and deserves careful study. We are born as we are, but our conduct is what we make it. It is certainly desirable to discover, if possible, why and how one unconsciously offends and this knowledge is of practical value to the attorney. It is well said that he knows best how to be a gentleman who knows best how not to give offense. There is no doubt that one of the qualities of the great lawyer is that of being a gentleman.

The greatest "verdict getters" with all their other qualities, have intelligence, force, and charm is not always the least of these. That law school would soon be marked that made of all its students attractive, pleasing personalities; that added to knowledge, wisdom; to information, tact; and to intelligence, courtesy. The inherent gentleman carries with him something that gives him instant advantage wherever he may be. He receives a consideration and commands an attention that it is somewhat difficult to analyze and to understand. A man of this kind has back of him and with him to speak for him the influence of the gentlemen of all time.

Those who lack this high quality at once acknowledge their inferiority by their acts and their attitude and are immediately at a disadvantage in a contest with a personality that is instinctively respected and admired. This valuable quality of charm is not simply a matter of birth, of education, of clothes, of family, of race, or of sex, but of conduct and of a right relation to other people. More than from anything else it grows out of thoughtfulness, good manners, and friendliness. Courtesy begets courtesy, and he is liked who himself likes others. The indispensable price of friendship is to be a friend.

The three qualities of personality, reputation, and professional ability are fused in an attorney and naturally are the main elements that constitute his ability as a lawyer. It is not always easy to estimate their comparative force as a means of winning success and their values may vary in different fields and in different cases. It is undoubtedly true that technical professional

ability alone, however valuable it may be, does not always command success, and, as in other professions and in other fields, the race is not always to the swift, nor the battle to the strong. Industry and thoroughness are in many instances more than a match for brilliant, but careless and lazy genius.

In every city and at nearly every county seat representatives of the various classes of lawyers can be found. One of the number is the lawyer to whom the right side of the most important case is likely to go. There is also the advocate who is naturally called upon to help fraud to win. These men have made their places in the community. The man with a shady reputation takes that, as well as his trial brief, into court, and the man who is known to the judge, to his fellow citizens, and to the jury for honesty and fairness begins every trial with a distinct advantage over an opponent without this reputation. These men of high character and ability are not only the leaders of their profession, but the trusted leaders of their fellowmen. They share with a type of family physician the unlimited confidence and trust of the community and their advice and assistance is sought on many questions outside of the strict field of the law.

The practice of law, like that of medicine, is much concerned with the abnormal. One profession has much to do with disease and suffering, and the other with injustice and crime, but this contact need not develop a narrowing pessimism that tends to make of this world mainly a place of anguish and of sin. The correct and wider view makes work in both fields a service of help and rescue of lessening suffering and combatting evil. The lawyer is the natural champion to be called upon to defend right, promote justice, protect the weak, and guard those priceless heritages of the ages that we inadequately describe as freedom and civilization. Through all the stress and strain the great physician and the great advocate both come to realize more and more that honesty and health are the normal conditions and that the high task given to them is that of making these conditions more nearly universal.

In conclusion, to summarize briefly what is discussed elsewhere, the great trial lawyer, though not necessarily a great orator, must be able to use language to produce results as a skilled craftsman

uses a delicate and complicated tool. He must have sympathy, tact and courtesy, and must know men and their ways. By study, experience, and a trained intuition, he will also have acquired an instant appreciation of the significance and force of evidence and will have learned its correct order of presentation. He must be able to control his temper and maintain his poise under trying conditions, and it will steady him and keep him sane if he has a sense of humor, which, however, he can hold in proper subjection. Finally, he must know the law.